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ORIGINAL

CLERK, U.S. DISTRICT COURT
By ______ Deputy

IN THE UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

MCW, INC. d/b/a BERNARD HALDANE ASSOCIATES, Plaintiff,	)	CIVIL ACTION NO. 3:02-CV-2727-G
vs.	)	
WWW.RIPOFFREPORT.COM, WWW.BADBUSINESSBUREAU.COM, and EDWARD MAGEDSON, a/k/a ED MAGIDSON, Defendants.	)	

DEFENDANTS' MOTION TO DISMISS FOR LACK OF JURISDICTION AND FOR FAILURE TO STATE A CLAIM AND BRIEF IN SUPPORT THEREOF

Defendants Edward Magedson and badbusinessbureau.com, LLC move for the dismissal of this action in its entirety on the grounds that this Court lacks personal jurisdiction over the Defendants and each of the causes of action pled by Plaintiff fail to state claim upon which relief can be granted. Badbusinessbureau.com, LLC is joining in this action although the Plaintiff has not properly named it and instead named the web sites as defendants.

I. BACKGROUND

MCW, Inc. d/b/a Bernard Haldane & Associates ("MCW") is a Texas Corporation. Edward Magedson is an individual who does not reside and has never resided in the State of Texas. (Edward Magedson Affidavit, Exhibit "A"). In 1969, Mr. Magedson attended school in Texas for four months. (Exhibit "A"). Edward Magedson owns no assets in Texas and has not been to Texas for over nine years (even then he merely drove through Texas). (Exhibit "A"). Edward Magedson does not own the URL. www.badbusinessbureau.com and he does not own the URL www.ripoffreport.com. (Exhibit "A"). Both of these URLs point to a web site which is called The Rip-Off Report which is owned and operated by badbusinessbureau.com, LLC, a limited liability company which is organized and existing under the laws of St. Kits/Nevis, West Indies. (Exhibit "A").

Although Plaintiff's Complaint acknowledges that badbusinessbureau.com, LLC is the owner of these domain names (Page 7), Plaintiff has not named badbusinessbureau.com, LLC as a Defendant and has made no allegations against the company. Additionally, badbusinessbureau.com, LLC does not have a business location in Texas, has no employees in Texas, owns no assets in Texas and does not conduct any business activities in Texas. (Exhibit "A").

Badbusinessbureau.com, LLC owns and operates the web site known as The Rip Off Report which is a forum for consumers to post complaints about companies. (Exhibit "A"). The reports are posted directly by consumers. (Exhibit "A"). To date, consumers have filed three hundred and sixty seven (367) reports about Bernard Haldane companies, twenty-seven (27) of which relate to the Texas location of Bernard Haldane. (Exhibit "A").

II. BADBUSINESSBUREAU.COM, LLC IS NOT NAMED AS A PARTY

Plaintiff has not named the limited liability company as a party even though Plaintiff acknowledges in the Complaint that the LLC owns the web site and even attaches to the Complaint the WHOIS report which proves that. Plaintiff does name two URL's as defendants and describes them in the complaint as "unknown business entit[ies]" and internet web site addresses. It is unclear why Plaintiff has chosen not to name badbusinessbureau.com, LLC despite its knowledge that the LLC owns the web sites at issue. What is clear is that Plaintiff has not properly pled a claim against the LLC and thus, this Court should rule that badbusinessbureau.com, LLC is not a party to this lawsuit. Plaintiff's allegations against the URLs are not sufficient to state a claim against the LLC.

III. THIS MATTER SHOULD BE DISMISSED FOR LACK OF JURISDICTION

Edward Magedson and badbusinessbureau, LLC, to the extent this Court determines it is a party to this case, are nonresident Defendants moving to dismiss for lack of personal jurisdiction. Thus, Plaintiff, MCW, bears the burden of establishing this Court's jurisdiction over them. *Wilson v. Belin,* 20 F.3d 644, 648 (5th Cir.), *cert. denied,* 513 U.S. 930 (1994). MCW cannot meet this burden because Magedson and badbusinessbureau.com, LLC have had no contacts with the State of Texas.

Due process requires two elements to exercise personal jurisdiction over a nonresident: (a) the nonresident must have some minimum contact with the forum which results from an affirmative act on its part; and (b) it must be fair and reasonable to require the nonresident to defend the suit in the forum state. *Stuart v. Spademan*, 772 F.2d 1185, 1189 (5th Cir. 1985).

The due process clause ensures that persons have fair warning that a particular activity may subject them to the jurisdiction of a foreign sovereign. *Burger King Corporation v. Rudzewicz,* 471 U.S. 462, 472 (1985).

To establish minimum contacts, a nonresident defendant must do some act or acts by which it "purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958).

In personum jurisdiction may be exercised over a non-resident based on specific jurisdiction or general jurisdiction. General jurisdiction requires that the contacts with the forum be continuous and systematic. *Hall v. Helicopteros Nacionales de Colombia, S.A.*, 466 U.S. 408, 415 (1984). Specific jurisdiction exists if the cause of action is related to, or arises out of, the defendant's contacts with the forum, and those contacts meet the due process standard. *Holt Oil & Gas Corporation v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986), *cert. denied,* 481 U.S. 1015 (1987).

Defendant expects that MCW will concede that general jurisdiction is lacking here. MCW cannot prove its burden that Magedson or badbusinessbureau.com, LLC have continuous and systematic contacts with Texas because there is a complete lack of any evidence that either does.

When specific jurisdiction is at issue, the minimum contacts inquiry focuses on whether the nonresident defendant has "purposefully directed" his activities at the forum state. *Spademan*, 772 F.2d at 1190. The purposeful availment requirement "ensures that a defendant will not be haled into a jurisdiction solely as a result of random, fortuitous, or attenuated contacts." *Burger King,* 471 U.S. at 475. A defendant must know that his tortious actions will affect a person in a particular forum before that forum can assert personal jurisdiction over that defendant. *Taylor v. Alex, Brown & Sons, Inc.* 2002 WL 31245369 (N.D. Tex. 2002).

Due process requires that defendants have sufficient "minimum contacts" with Texas so as not to offend "traditional notions of fair play and substantial justice." *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (internal quotations & citations omitted). Here, those minimum contacts are completely lacking.

Each of Plaintiff's claims is based upon Defendants' relationship to the Rip-Off Report web site. Edward Magedson, however, does not own or directly operate the web site. He provides services for the web site owner, badbusinessbureau.com, LLC. The LLC owns and operates the web site from a location outside of Texas. For specific jurisdiction, the claim must arise out of the contact with the forum state. This claim arises out of Rip-Off Report's "use" of the Bernard Haldane trademark on its web site. MCW cannot prove jurisdiction solely based on the fact that badbusinessbureau.com, LLC operates a web site that can be accessed in Texas. In 1997, the Western District of Pennsylvania Court established a sliding scale test for personal jurisdiction based upon a web site, which has been widely adopted by many district and circuit courts, including the Fifth Circuit. *Zippo Manufacturing Company v Zippo Dot Com, Inc.*, 952 F.Supp. 1199. The *Zippo* sliding scale test divides internet activity into three groups: "(1) when defendant is clearly transacting business in foreign jurisdictions; (2) when the defendant operates an interactive website allowing potential customers in foreign jurisdictions to communicate about goods and services; and (3) when defendant passively posts information on the internet but has no further communication with potential customers." 952 F.Supp. at 1123-24.

Most courts agree that a passive web site that does little more than make information available to interested parties does not constitute grounds for personal jurisdiction. *See Accuweather, Inc. v. Total Weather, Inc.*, 223 F.Supp.2d 612 (M.D.Pa. 2002); *Kovacs v. Jim*, 2002 WL 31507172 (N.D.Ill. 2002); *Cybersell, Inc. v. Cybersell Inc.*, 130 F.3d 414 (9th Cir. 1997); *Hearst Corp. v. Goldberger*, 1997 WL 97097 (S.D.N.Y. 1997); *Weber v. Jolly Hotels*, 977 F.Supp.327 (1997); *Bensusan Restaurant Corp. V. King*, 937 F.Supp. 295 (S.D.N.Y. 1996).

At the other end of the spectrum, most courts also agree that when a defendant is clearly transacting business in a foreign jurisdiction through the use of a web site, and the claim arises out of that transaction of business, personal jurisdiction exists. *Zippo; Compuserve Inc. v. Patterson*, 89 F.3d 1257 (6th Cir. 1996).

As to those web sites which fall in the middle category, the *Zippo* Court held that "the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet." 952 F.Supp. at 1124.

The activities of badbusinessbureau.com, LLC alleged in the Complaint, fall into the middle category described by the *Zippo* Court. Badbusinessbureau.com, LLC runs an interactive web site in the sense that it allows consumers to post information about their experiences with companies. *Mothers Against Drunk Driving v. DAMMAD, Inc.*, 2003 WL 292162 (N.D.Tex.) is a highly instructive case applying the *Zippo* sliding scale test in the trademark context. In

Mothers Against Drunk Driving, the Court granted the defendant's motion to dismiss for lack of jurisdiction where the defendant operated an interactive web site which invited anonymous tips regarding illegal drug activity, solicited donations, and sold drug kits. The evidence was that the defendant had received approximately twenty (20) tips from Texas sources, had received several donations from Texas sources, and had sold two kits to Texas buyers. The Court held that these activities represented "nothing more than attenuated contacts with Texas that fail to meet the minimum threshold for specific jurisdiction." *Mothers Against Drunk Driving* at *6.

The activity which the Northern District found to be "attenuated contacts" in *Mothers Against Drunk Driving* is more substantial than the activity at issue here. Here, there are only twenty-six (27) reports about the Texas office of Bernard Haldane. That is approximately .05 percent of the 45,875 reports currently posted.

Further, this case is even more unique and the contacts more attenuated because Defendants did not post the reports and thus, did nothing to purposefully avail themselves of the benefits of doing business in Texas. Here, the reports that MCW complains about were all posted by consumers, not by Defendants. (See Exhibits 5-9 of Complaint, authored by "Alan" in Austin, "Tim" in Mansfield, "Claudia" in Austin, and "Cynthia" in Illinois.)

This case is analogous to *Revell v. Lidov,* 317 F.3d 567 (5th Cir. 2002) where the Court granted a motion to dismiss for lack of jurisdiction over a university which hosted a web site upon which a professor posted an article which he authored which allegedly defamed the former associate director of the FBI who resided in Texas. The Court recognized that the university's web site was interactive in that readers could post their own articles. In doing so, the Court noted that the post was to the entire world and was not directed specifically at Texas. *Id.* at 475. The Court held that the plaintiff must show that the defendant knew that the plaintiff would suffer the brunt of the harm caused by the tortious conduct in the forum and must point to specific activity indicating that the defendant expressly aimed its tortious conduct at the forum. *Id.* at 476. This MCW can not do. The activity complained of against Magedson and the web sites is the hosting and publishing of information authored by others. This activity is in no way aimed expressly at Texas.

Accordingly, this court does not have jurisdiction over Edward Magedson or badbusinessbureau.com, LLC and this case should be dismissed for lack of jurisdiction.

IV. THE CLAIMS ARE BARRED BY THE COMMUNICATIONS DECENCY ACT

The conduct which MCW alleges against Defendants, hosting an internet cite which contains harmful material is an activity which is unequivocally protected by the Communications Decency Act, 47 U.S.C.A. §230. *Zeran v. America Online, Inc.*, 129 F.3d 327 (4th Cir. 1997); *Doe v. America Online, Inc.*, 783 So.2d 1010 (Fl. 2001); *Schneider v. Amazon.com. Inc.,* 31 P.3d 37 (Wash. App. 2001).

47 U.S.C.A. §230 provides that "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." The statute defines provider or user of an interactive computer service as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet…"

"Three elements are thus required for §230 immunity: the defendant must be a provider or user of an interactive computer service; the asserted claims must treat the defendant as a publisher or speaker of information; and the information must be provided by another information content provider." *Schneider* at 39.

Web hosts are recognized as §230 providers of interactive computer services. *See Schneider* at 40. The legislative history of §230 makes clear that Congress intended to extend immunity to all civil claims. *Id.* at 42. As the Fourth Circuit explained in *Zeran,* Congress deliberately chose not to deter harmful online speech by means of civil liability on "companies that serve a intermediaries for other parties' potentially injurious messages." *Id.*

The Communications Decency Act preempts state law to the extent that state law allows claims against internet service providers. "Preemption is required where state law conflicts with the express language of a federal statute." *Doe. v. America Online* at 1015. Further, the Communications Decency Act applies even where the web host had notice and refused to remove the offending material. *Id.* at 1012-1013.

MCW's claims are clearly barred by the Communications Decency Act.

V. COUNTS ONE AND TWO FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

15 U.S.C. § 1125 (a) provides that any person who in connection with any goods or services uses a trademark in a manner which "in commercial advertising or promotion" misrepresents the quality of the services shall be liable civilly. First, Defendants have not "used" the trademark Bernard Haldane. Rather, the authors of the articles have used it. Further, the use which MCW complains of is not "in commercial advertising or promotion." The Rip-Off Report is a consumer advocacy publication that is protected by the First Amendment. When a consumer offers their opinion as to how they have been treated by a company, they are not advertising or promoting anything. They are exercising their freedom of speech. Likewise, when a publisher publishes that content, the publisher is not using that content in commercial advertising or promotion. The trademark laws were not written to cover disparagement claims and do not cover this disparagement claim.

VI. COUNT THREE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

MCW bases its Third Count on Common Law Unfair Competition. Defendants, however, are not in competition with MCW. Badbusinessbureau.com is in the business of hosting a web site. It does not provide any services in the employment or career management field.

VII. COUNT FOUR FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

MCW's fourth claim is squarely barred by the Communications Decency Act. It arises solely out of the Defendants' purported publication of disparaging information authored by other individuals about Bernard Haldane. (¶¶62, 63, 64).

VIII. COUNT FIVE FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

MCW's fifth claim is based on common law trademark infringement. Common law trademark infringement, however, arises out of a likelihood of confusion. MCW has not pled and cannot plead that Defendants used the Bernard Haldane trademark in a manner which would cause the average consumer to be confused into believing there is some affiliation between Defendants and Bernard Haldane. It is abundantly clear to any reader of the reports filed by consumers that there is no affiliation between the two companies.

IX. CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Complaint be dismissed in its entirety.

DATED this 19 day of March, 2003.

GRANT WILLIAMS P.C.

By________________________

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